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In The
Supreme Court of the United States
October Term, 1992

GARNER GREGORY, ADM'R OF THE ESTATE OF JOE EDWIN GREGORY, BEATE GREGORY, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF JOE RAY GREGORY, AND DONNA MAE FIELDS,
Petitioners,

v.

CITY OF ROGERS, ARKANSAS, PTL. RONNIE HOWELL, INDIVIDUALLY AND IN HIS CAPACITY AS A POLICE OFFICER OF THE CITY OF ROGERS, ARKANSAS, AND IMPERIAL CASUALTY AND INDEMNITY CO.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES INVOLVED

Ark. Code Ann. § 12-11-110(a) provides, in pertinent

part:

> It shall bee the duty of all peace officers to arrest any insane or drunk person, who they find at large and not in the care of some discreet person, and take him before some magistrate . . . .

Ark. Code Ann. § 5-71-212(a) provides:

> A person commits the offense of public intoxication if he appears in a public place manifestly under the influence of alcohol or a controlled substance to the degree and under circumstances such that he is likely to endanger himself or other persons or property, or that he unreasonably annoys persons in his vicinity.

STATEMENT

Petitioners statement of the case is correct. Pet.Cert. at 4-7. The factual recitation from the opinion of the *en banc* United States Court of Appeals for the Eighth Circuit, *Gregory v. City of Rogers,* 974 F.2d 1008 (8th Cir. 1992) (Pet.Cir. at A3-A6, A15-A16; majority and dissent, respectively) also states the uncontested facts and the inferences that should be drawn therefrom on a motion for summary judgment. F.R.C.P. 56.

REASONS FOR DENYING THE WRIT

I

THIS CASE DOES NOT MERIT CERTIORARI BECAUSE IT DOES NOT INVOLVE AN ABUSE OF GOVERNMENTAL POWER SUFFICIENT TO INVOKE THE PROTECTIONS OF THE DUE PROCESS CLAUSE OR § 1983. THE AMENDED COMPLAINT AND THE PETITION FOR CERTIORARI ALL SOUND IN TORT TRYING TO BOOTSTRAP AN ORDINARY TORT INTO A CONSTITUTIONAL VIOLATION.

A

> Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," *Davidson v. Cannon, supra,* at 348; see also *Daniels v. Williams, supra,* at 331 ("'"to secure the individual from the arbitrary exercise of the powers of government,"' and 'to prevent governmental power from being used for the purposes of oppression.'") (internal citations omitted); *Parratt v. Taylor,* 451 U.S. 527, 549 (1981) (POWELL, J., concurring in result) (to prevent the "affirmative abuse of power"). Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.

DeShaney v. Winnebago County Dept. of Social Services,

489 U.S. 189, 196 (1989). There must be a violation of federal law. Even a gross violation of state law without a violation of the constitution does not state a claim under § 1983. *Collins v. City of Harker Heights, Texas,* 112 S.Ct. 1061, 1065 (1992).

In no way can this case be factually characterized as a constitutional violation by the Rogers police under *DeShaney* and *Collins*. From the amended complaint and the petition for certiorari, it is apparent that this case seeks to open a back door on *DeShaney* and other cases to purported constitutional violations in tort clothing. For example, the petition for certiorari refers to "a duty of care" interspersed in the contentions that there was an affirmative duty to Gregory and Fields. Pet.Cert. at 16, 17. "A duty of care" is only another way of saying "negligence" because it carries with it no level of intent, and that is mere negligence. (*See also* Part C, *infra.*) Negligence, of course, will not support a constitutional or § 1983 claim. *Paul v. Davis,* 424 U.S. 693, 701 (1976); *Procunier v. Navarette,* 434 U.S. 555 (1978), *Baker v. McCollan,* 443 U.S. 137 (1979); *Parratt v. Taylor,* 451 U.S. 527, 544 (1981); *Daniels v. Williams,* 474 U.S. 327, 335-36 (1986).

When state custody is involved, the person in custody has the burden of proving that the state actor acted with "deliberate indifference" to a perceived danger. *Estelle v. Gamble,* 429 U.S. 97 (1976). This since has been applied to other state action. *Canton v. Harris,* 489 U.S. 378, 388 (1989); *Collins v. City of Harker Heights, Texas, supra,* 112 S.Ct. at 1068. The facts alleged in the amended complaint, after sifted through the sieve of discovery and the summary judgment motion hardly rise to the level of "deliberate indifference" to a danger.

B

Here, further bootstrapping, petitioners seek to create a bare inference of custody to get around the language of *DeShaney* and possibly lower their burden of proof where the facts indicate otherwise. *DeShaney,* as this Court recognized, surely was a tragic case, but it still did not rise to the level of an affirmative duty on the part of the state actors:

> A State may, through its courts and legislatures, impose such affirmative duties of case and protection upon its agents as it wishes. But not "all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment." *Daniels v. Williams, supra,* 474 U.S. at 335. Because, as explained above, the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so--though calamitous in hindsight--simply does not constitute a violation of the Due Process Clause.

Id. at 262.

As tragic and compelling a case as *DeShaney* presented on the constitutional standard of care, *a fortiori,* this case can fare no better. The state actors in *DeShaney* took affirmative acts well aware of the risks, and a tragedy occurred which would not have happened if the state actors had thought it out better and not put poor Joshua back into his father's hands. Nevertheless, no cause of action is stated here under *DeShaney* or *Estelle v. Gamble,* because Officer Howell did nothing to increase any risk of harm to Gregory and Fields. They were intelligent enough to have

a designated driver in Turner, but they were not smart enough to remain with it. They chose to drive away from the curb in front of the Rogers Police Department while drunk and at a high rate of speed. He undertook no affirmative duty as to them, and the constitution does not imply one. Where in the constitution is the government expected to protect people from their own folly when the government has done nothing to aid in the creation of that folly?

C

Petitioners are confined to the phrase "duty of care"; *see* part A, *supra*; by the law as it has developed thus far. A better phrase may be the "constitutional duty of care."

Respondents concede that the constitutional duty of care does need clarification in this Court since this issue was left open in *DeShaney, supra,* at 202 n.10 and *Daniels, supra,* at 334 n.3. *Estelle* and *Collins,* however, strongly indicate that this duty is "deliberate indifference."

The facts of this case give the Court the opportunity to close this asserted back door to *DeShaney,* determine whatever level of intent is required between negligent acts and intentional acts for § 1983 violations, and still affirm the decision below because, under whatever standard the Court may apply, the petitioners have not satisfied and cannot satisfy it in this case.

And, if the Court grants certiorari, a pandora's box of subissues will have to be addressed:

1. What will this constitutional duty of care be? (1) gross negligence, (2) reckless disregard, (3) intentional

disregard or deliberate indifference, or (4) intentional acts? How will it be defined in the context of this case:

a. Did Howell have a duty to arrest Gregory and Fields for public intoxication? Stated another way, does a person have a constitutional right to be arrested where the officer has discretion not to or the officer could be sued for false arrest if he did?

Petitioners assert the remarkable proposition that Howell had a constitutional duty to arrest them. They rely on Ark. Code Ann. § 12-11-110(a), adopted in 1869, which provides, in pertinent part:

> It shall bee the duty of all peace officers to arrest any insane or drunk person, who they find at large and not in the care of some discreet person, and take him before some magistrate . . . .

They overlook, however, a provision of the 1975 Arkansas Criminal Code, Ark. Code Ann. § 5-71-212(a), which provides:

> A person commits the offense of public intoxication if he appears in a public place manifestly under the influence of alcohol or a controlled substance to the degree and under circumstances such that he is likely to endanger himself or other persons or property, or that he unreasonably annoys persons in his vicinity.

When this statute was adopted, the Arkansas General Assembly specifically rejected prior law and required "intoxication-plus" by adding additional elements. Mere drunks

were no longer to be arrested. *Id. Commentary.* It is axiomatic that the 1975 enactment controls. The customary practice in Arkansas is not to arrest passengers during a DWI arrests, for example, unless the passenger is disorder or a danger to himself or others. Also, jail space is at a premium everywhere in the nation. The police have this discretion all over the country.

Petitioners had no constitutional right to be arrested. *McKee v. City of Rockwell,* 877 F.2d 409, 414 (5th Cir. 1989). *See also Auclair v. State,* 660 P.2d 1156, 1162 (Wyo.), *cert. denied and app. dismissed,* 464 U.S. 909 (1983) (no constitutional right to be arrested at the earliest opportunity). Even if they did, where can the Court draw the line? Just how drunk is drunk? Will officers act at their peril to arrest to avoid liability from this type of occurrence and then be held liable for false arrest if they are wrong? Granting qualified immunity is no answer because Fourth Amendment rights would be denigrated to create a new standard of care. The implications of this contention are horrendous. If petitioners prevail on their claim, police officers nationwide will be virtually compelled to not exercise discretion not to arrest because there apparently would then be a duty to arrest. Potentially every police-citizen contact could ultimately be questioned under the doctrine advanced by petitioner in this case.

b. Are officers effectively obligated to make every traffic stop a full custodial arrest of the occupants to be sure they are not drunk? The next extension of this case would be to constitutionalizing the failure to arrest a driver whom the police had some reason to believe might have been drunk after that drunk driver has an accident with a third party. How far should some concept of foreseeabili-

ty extend under the constitution?

c. Did he have a duty to do a full body search of Turner to be sure that he had the keys to the car? Is that not an unreasonable search of Turner under the circumstances? If not, will officers be compelled to be more intrusive of detainees than they otherwise need to? What if he had Turner's keys but Gregory had his own set? Where does foreseeability fit into the calculus?

d. Should a different standard apply because the car was Gregory's?

e. Can Howell constitutionally assume that Gregory and Fields were responsible for their own actions since they were responsible enough to have a designated driver?

f. Does or should the constitution make a police officer the guardian of every person he comes into contact with? *See Collins, supra,* at 1070 ("the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attending living together in society.'" *Daniels v. Williams,* 474 U.S. at 332").

g. Where does this duty begin and end?

h. How does comparative fault enter into these issues? Here, Gregory and Fields are clearly far more at fault for their injuries than Howell, if he has any fault at all. Arkansas is a comparative fault state, and that should have to apply as well under 42 U.S.C. § 1988, or should it? Would the Due Process Clause override comparative fault? Could clear comparative fault take a case like this

one out on summary judgment? Is the judgment below correct simply on the question of comparative fault?

i. What about a "but for" test? Is a "but for" test is foeclosed by *DeShaney?*

2. How does the Court characterize Office Howell's conduct? Where does Officer Howell's state of mind fall in this continuum? What did he do that was grossly negligence, reckless, or intentional against Gregory and Fields? Beyond any common law duty of care, nothing. *Arguendo,* the best inference that can be drawn from these facts is that he can only be said to be guilty mere negligence.[1] That, of course, fails to state a constitutional claim.

II

THIS CASE DOES NOT MERIT CERTIORARI: THERE IS NO CONFLICT IN THE CIRCUITS AND THE DECISION IS NOT CONTRARY TO *DESHANEY, ESTELLE V. GAMBLE,* OR OTHER CASES.

A

There is no conflict in the circuits. While the decisions cited by petitioner differ in the level of intent re-

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[1] The amended complaint sounds only in tort with creative pleading designed to make this tort fly like a "constitutional tort," if there should even be such a phrase. We are dealing with alleged constitutional violations not constitutional torts. The latter phrase should thus be retired.

quired by the state actor, this is not material to this case. Under whatever level of intent more than mere negligence that one applies to the facts of this case, the outcome was correct.

Each of the cases cited by petitioners or decided by the Eighth Circuit involved some affirmative act of the state actor that put the plaintiff in actual danger. This case involves no such facts, and that absolutely separates this case from *DeShaney v. Winnebago County Dept. of Social Services, supra,* and *Collins v. City of Harlan Heights, Texas, supra. See, e.g., Freeman v. Ferguson,* 911 F.2d 52 (8th Cir.1990) (police chief directed officers not to interfere with person who ultimately killed his victims; duty created; distinguishing *DeShaney* because state actors condoned the violence); *Wood v. Ostrander,* 879 F.2d 583, 589-90 (9th Cir.1989), *cert. denied* 111 S.Ct. 341 (1990) (officer arrested driver of car, impounded car, and left female passenger in a high crime area to fend for herself; she hitchhiked and was raped; duty created because officer "affirmatively placed plaintiff in a position of danger; pre-*DeShaney*); *Cornelius v. Town of Highland Lake,* 880 F.2d 348, 356 (11th Cir.1989), *cert. denied* 110 S.Ct. 1784 (1990) (plaintiff was abducted by unsupervised work release inmates; *DeShaney* distinguished); *White v. Rochford,* 592 F.2d 381 (7th Cir.1979) (similar to *Wood;* children were left by police on the side of a busy Chicago expressway on a cold night after their parent was arrested which resulted in physical and emotional injury to children).

B

As previously stated, the decision of the Court of

Appeals is correct under *DeShaney, Estelle v. Gamble,* and *Collins,* so there is no ground for granting certiorari there.

CONCLUSION

The petition for writ of certiorari should be denied. The Court could, however, grant certiorari to affirm the decision of the Court of Appeals.

Respectfully submitted,

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